



The State of New Hampshire  
**Department of Environmental Services**



Michael P. Nolin  
Commissioner

Lebanon Pet & Aquarium Center  
Attn: Stephen Rojek  
196 South Main Street, Route 12A  
West Lebanon, NH 03784

**NOTICE OF PROPOSED  
ADMINISTRATIVE FINE  
AND HEARING  
NO. AF 04-024**

May 19, 2004

**I. INTRODUCTION**

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division ("the Division") to Lebanon Pet & Aquarium Center, pursuant to RSA 487:16-a and NH Admin. Rule Env-Ws 1303.01. The Division is proposing that fines totaling **\$1,000** be imposed against Lebanon Pet & Aquarium Center for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

**II. PARTIES**

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, NH.
2. Lebanon Pet & Aquarium Center is a corporation registered to do business in New Hampshire having a mailing address of 196 South Main Street, Route 12A, West Lebanon, NH 03784.

**III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS**

1. RSA 487:16-a prohibits the sale, offering for sale, distribution, importation, purchase, propagation, transportation, or other introduction into the state of any exotic aquatic weed. Pursuant to RSA 487:5, the Commissioner of the Department of Environmental Services ("DES") has adopted Env-Ws 1300 to implement this program.
2. Pursuant to RSA 487:7, II, the Commissioner is authorized to impose administrative fines of up to \$2,000 per offense for violations of RSA 487:16-a or Env-Ws 1300. The Commissioner has adopted Env-C 603.10 to establish the schedule of fines for this program.
3. Env-Ws 1303.01 lists exotic aquatic weeds that are prohibited from being offered for sale, distributed, sold, imported, purchased, propagated, transported or introduced in the state, pursuant to RSA 487:16-a, because they pose a substantial threat to native species in the state.
4. On July 25, 2002, Division personnel inspected Lebanon Pet & Aquarium Center and found that the respondent was offering for sale two invasive aquatic plants (*Myriophyllum aquaticum* and *Egeria densa*) in violation of Env-Ws 1303.01(f) and (j). The manager of the facility was informed of the violation and was asked to remove the plant material from the selling floor.

Educational materials were left at the store, including a pamphlet that details the 14 species of prohibited exotic aquatic plants in New Hampshire.

5. On July 26, 2002, the Division issued a Letter of Deficiency ("LOD") to the Lebanon Pet & Aquarium Center for the sale of *Myriophyllum aquaticum* and *Egeria densa*. Fact sheets detailing the legislation and a list of prohibited exotic aquatic plants were enclosed with the LOD. The LOD was received by the Lebanon Pet & Aquarium on or about August 1, 2002, as evidenced by the signed postal receipt.
6. On August 12, 2003, Division personnel inspected Lebanon Pet & Aquarium Center. No exotic aquatic species were found. Educational materials regarding prohibited aquatic species, including a pamphlet that details the 14 species of prohibited exotic aquatic plants, was provided to store personnel.
7. On Tuesday March 29, 2004, Division personnel inspected Lebanon Pet & Aquarium Center and found that the respondent was offering for sale one invasive aquatic plant (*Cabomba caroliniana*) in violation of Env-Ws 1303.01(c). The manager of the aquarium section of the facility was informed of the violation and was asked to remove the plant material from the selling floor.

#### IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

1. Lebanon Pet & Aquarium Center has violated RSA 487:16-a and Env-Ws 1303.01(c) by offering for sale several species of listed prohibited exotic aquatic plants (*Cabomba caroliniana*, *Myriophyllum aquaticum*, and *Egeria densa*). For this violation, Env-C 603.10(a) specifies a fine of \$1,000 per month or portion thereof in which any plants continue to be sold. At this time, the Division is seeking \$1,000 for this violation.

**The total fine being sought is \$1,000.**

#### V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

**Pursuant to Env-C 601.06, Lebanon Pet & Aquarium Center is required to respond to this notice. Please respond no later than June 19, 2004, using the enclosed colored form.**

1. If Lebanon Pet & Aquarium Center would like to have a hearing, please sign the appearance section of the colored form and return it to the DES Legal Unit, as noted on the form. A Notice of Scheduled Hearing will be issued.
2. If Lebanon Pet & Aquarium Center chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If the Lebanon Pet & Aquarium Center wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate Lebanon Pet & Aquarium Center's interest in settling.

Lebanon Pet & Aquarium Center is not required to be represented by an attorney. If Lebanon Pet & Aquarium Center chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

## VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Lebanon Pet & Aquarium Center committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules.

Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Lebanon Pet & Aquarium Center committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

\* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Lebanon Pet & Aquarium Center proves, by a preponderance of the evidence, applies in this case:**

1. The violation was a one-time or non-continuing violation, **and** Lebanon Pet & Aquarium Center did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Lebanon Pet & Aquarium Center did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Lebanon Pet & Aquarium Center was making a good faith effort to comply with the requirement that was violated.
3. Lebanon Pet & Aquarium Center has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to Lebanon Pet & Aquarium Center's case which was not known to the Division at the time the fine was proposed.


**\*\*\*\*\*IMPORTANT NOTICE\*\*\*\*\***

**An administrative fine hearing is a formal hearing.** Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Lebanon Pet & Aquarium Center committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Lebanon Pet & Aquarium Center's opportunity to present testimony and evidence that Lebanon Pet & Aquarium Center did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Lebanon Pet & Aquarium Center has any evidence, such as photographs, business records or other documents, that it believes show that Lebanon Pet & Aquarium Center did not commit the violation(s) or that otherwise support Lebanon Pet & Aquarium Center's position, Lebanon Pet & Aquarium Center should bring the evidence to the hearing. Lebanon Pet & Aquarium Center may also bring witnesses (other people) to the hearing to testify on Lebanon Pet & Aquarium Center's behalf.

**If Lebanon Pet & Aquarium Center wishes to have an informal meeting to discuss the issues, Lebanon Pet & Aquarium Center must contact the DES Legal Unit at (603) 271-6072 to request a prehearing conference.**

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Information regarding this proposed fine may be made available to the public via the DES Web page ([www.state.nh.us.des](http://www.state.nh.us.des)). If Lebanon Pet & Aquarium Center has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.

**COPY**  
  
Harry T. Stewart, P.E., Director  
Water Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Gretchen R. Hamel, Administrator, DES Legal Unit  
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB  
Russell Nylander, DES Chief Engineer  
Public Information Officer, DES PIP Office  
Jody Connor, Limnology Center Director  
Amy Smagula, Exotic Species Coordinator

**\*\*\* RETURN THIS PAGE ONLY \*\*\***

**LEBANON PET & AQUARIUM CENTER IS REQUIRED BY LAW  
TO RESPOND TO THIS NOTICE**

**PLEASE RESPOND NO LATER THAN June 19, 2004**

Please check the appropriate line and fill in the requested information below.

**APPEARANCE** On behalf of Lebanon Pet & Aquarium Center.

\_\_\_\_\_ I request to have a **formal hearing** scheduled in this matter.

\_\_\_\_\_ I request to have a **prehearing conference** scheduled in this matter.

\_\_\_\_\_ I would like to **meet informally** to discuss the issues in this matter.

**WAIVER OF HEARING** On behalf of Lebanon Pet & Aquarium Center.

\_\_\_\_\_ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$1,000 paid to "Treasurer, State of New Hampshire" is enclosed.\*

*\* If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

**Pursuant to Env-C 203.05 please provide the following information:**

\_\_\_\_\_  
Signature Date

Name (please print or type): \_\_\_\_\_

Title: \_\_\_\_\_

Phone: \_\_\_\_\_

**RETURN THIS PAGE ONLY TO:**  
**Department of Environmental Services ~ Legal Unit**  
**Attn: Michael Scalfani, Legal Assistant**  
**29 Hazen Drive, P.O. Box 95**  
**Concord, NH 03302-0095**

# ENVIRONMENTAL Fact Sheet



6 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • [www.des.state.nh.us](http://www.des.state.nh.us)

CO-2

2002

## Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

*This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.*

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.